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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972
No. 72-1666

PARAMOUNT FILM DISTRIBUTING CORPORATION,

*Petitioner,*

—against—

THE STATE OF NEW YORK,

*Respondent.*

## BRIEF IN OPPOSITION TO CERTIORARI TO THE NEW YORK STATE COURT OF CLAIMS

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## BRIEF IN OPPOSITION TO CERTIORARI TO THE NEW YORK STATE COURT OF CLAIMS

### STATEMENT

The State of New York submits this brief in opposition to the petition of Paramount Film Distributing Corporation for a writ of certiorari "to the New York State Court of Claims to review the non-final judgment of the New York State Court of Appeals." In reversing the decision of the Appellate Division of the New York Supreme Court, Third Judicial Department, the New York Court of Appeals on June 8, 1972 denied recovery of motion picture license fees paid without protest (and allowed refund of fees paid under protest). On September 28, 1972 the New York Court of Appeals amended its remittitur by adding the following:

> "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the Due Process Clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 NY 2d 415)."

## QUESTIONS PRESENTED

1. Is this petition (docketed June 6, 1973) timely? (The New York Court of Appeals amended its remittitur on September 28, 1972 to state that it had passed on a Federal question.)

2. Does petitioner raise a substantial Federal question?

## FACTS

From the time of its incorporation in 1939 up to March 15, 1965 claimant, a Delaware corporation which distributed motion pictures throughout the United States, from time-to-time applied for and paid for film licenses without any objection or protest and without any challenge to the constitutionality of the New York motion picture licensing statute.

*Claimant was never denied a license to exhibit any of its films.*

The constitutionality of the New York motion picture licensing statute (Education Law §§ 120-132) was on various occasions the subject of litigation. *Jos. Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959); *Matter of Connection Company* v. *Regents*, 17 [N.Y.] A D 2d 671 (3d Dept., 1962), aff'd. 12 N Y 2d 779. In none of these cases was the New York motion picture licensing statute held to be unconstitutional.

On March 1, 1965 this Court held a Maryland motion picture licensing statute unconstitutional on the ground that it prohibited exhibition of a film pending judicial review of denial of a motion picture license. *Freedman* v. *Maryland*, 380 U.S. 51. On March 15, 1965 this Court held the New York motion picture licensing statute unconstitutional. *Matter of Trans-Lux Distributing Corp.* v. *Board of Regents*, 380 U.S. 259.

Thereafter petitioner filed this claim to recover motion picture licensing fees paid between June 10, 1959 and June 10, 1965.

## THE COURT OF APPEALS DECISION

On June 8, 1972 the majority opinion of the New York Court of Appeals denied claimant recovery of motion picture license fees paid without protest and stated:

> "In summary, the payment of license fees without protest was voluntary for purposes of recovery of moneys paid as fees or taxes; hence, no recovery for the fees collected without protest or other resistance may be allowed. Since a small percentage of fees were paid under protest between March and June, 1965, *the matter should be remanded so that such fees may be computed*, and recovery allowed." (Emphasis added.)

On September 28, 1972 the New York Court of Appeals amended its remittitur to state:

> "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the Due Process Clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights. (30 N Y 2d 415)."

## ARGUMENT

### POINT I

**CERTIORARI SHOULD BE DENIED BECAUSE IT WAS NOT SOUGHT WITHIN 90 DAYS OF THE COURT OF APPEALS' DECISION WHICH FINALLY DETERMINED ALL FEDERAL QUESTIONS IN THE CASE AND WHICH AMENDED THE REMITTITUR TO STATE THAT IT HAD CONSIDERED A FEDERAL QUESTION.**

A petition for certiorari must be brought within 90 days of the final judgment rendered by the highest court of a State in which a decision could be had. 28 U.S.C §§ 1257, 2101(c).

As stated above, the June 8, 1972 opinion of the majority of the New York Court of Appeals denied recovery for fees paid without protest and stated:

> "Since a small percentage of fees were paid under protest between March and June, 1965, *the matter should be remanded so that such fees may be computed* and recovery allowed." (Emphasis added.)

Thus the June 8, 1972 opinion determined all issues in this lawsuit except ministerial computation of fees paid under protest.

On September 28, 1972 the Court of Appeals denied reargument and amended the remittitur to state that a Federal question had been passed upon.

On February 13, 1973 the New York Court of Claims entered an order which computed the damages. That order stated:

> "Both parties agree that the fees paid under protest and for which recovery may be had is the sum of $341.00." (Petition, Ex. B, p. 27)

Since that computation was made on consent, it would of course not be subject to appeal.

We point out that the petition docketed in this Court June 6, 1973 seeks certiorari more than 90 days after computation, as

directed in the remand, of the fees paid under protest. Petitioner selects March 13, 1973, the date of entry of final judgment pursuant to the February 13, 1973 order of the Court of Claims, as the date on which his time to apply certiorari commenced to run.

Respondent urges that the matter of refund of payments made without protest was finally determined on September 28, 1972 and that all Federal questions were then decided. All that remained was a ministerial computation of damages based on payments enumerated in the affirmed findings of fact. (R 415-416; Findings 9-12; Bill of Particulars, R 536).*

A judgment of a state court of last resort reversing a lower court decision and remanding the case for further proceedings satisfies the requisite finality for purposes of review before the Supreme Court of the United States when all Federal rights asserted are disposed of, notwithstanding the remand for further proceedings. *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945). The test is whether the record shows that the order of the state appellate court has in fact fully adjudicated all rights and that the adjudication is not subject to further review by a state court. *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 72 (1946). In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), this Court held final for purposes of review the granting of a *temporary* injunction by an Illinois court. In a footnote (p. 418) this Court wrote:

> "Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing."

That principle applies more strongly in the instant case since the computation of fees paid under protest on remand could have no effect upon the result reached in the Court of Appeals with respect to the fees paid without protest.

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* Parenthetical references beginning with the letter R refer to pages of the Record on Appeal in the New York Court of Appeals.

Since petitioner's time started to run with the amendment of the remittitur on September 28, 1972, the petition must be denied as not timely. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

## POINT II

## THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

### A. Petitioner does not present a due process question.

The remittitur of the state court of last resort is not controlling as to whether or not a Federal question is presented. *Honeyman* v. *Hanan*, 300 U.S. 14 (1936); *Benz* v. *N.Y.S. Thruway Authority*, 369 U.S. 147 (1967).

In the instant case the question certified by the New York Court of Appeals was whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and to obtain a refund of fees already paid violates the due process clause of the Fourteenth Amendment.

First, we disagree with petitioner's contention that before *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and *Matter of Trans-Lux Distributing Corp.* v. *Board of Regents*, 380 U.S. 259 (1965), two proceedings would have been necessary for it to litigate its right to recover payments made under an allegedly void statute. In *Guaranty Trust Co.* v. *State of New York*, 299 N.Y. 295 (1949), the New York Court of Appeals held that a bank which had paid an excise tax (unemployment insurance contributions) under compulsion of a void statute had a single remedy in the New York State Court of Claims.* The New York Court of Appeals wrote (pp. 301-302):

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* In that case, the Court of Appeals held (p. 300) "claimant's cause of action arose immediately that it paid the tax" and dismissed the claim as untimely. In the instant case, the Court of Appeals rejected the State's argument based on the holding in *Guaranty*.

> "Agreeing again with the Court of Claims, we hold that subdivision 6 of section 570 of the Labor Law does not establish an exclusive remedy for obtaining a refund of taxes paid under compulsion of a void statute. The claimant, therefore, had the right to seek restitution in this proceeding. (*New York R. T. Corp.* v. *City of New York*, 275 N.Y. 258, 264)."

In *Travelers Indemnity Co.* v. *State of New York*, 33 A D 2d 127 (3d Dept., 1969), affd. 28 N Y 2d 561, the New York Appellate Division and the Court of Appeals rejected the State's contention that the New York Court of Claims lacked jurisdiction of a claim for money because claimant insurance company had not established its right to the refund in a separate proceeding in State Supreme Court. The Third Department wrote (p. 128):

> "The fact that in deciding the issue of respondent's entitlement to a refund the Court of Claims had to pass upon the validity of a determination made by the Superintendent of Insurance does not affect this conclusion. In comparable situations two separate actions have not been required (see *China City Corp.* v. *State of New York*, 51 Misc 2d 429) and, of course, such a position favors efficient judicial administration."

Likewise in *Benz* v. *N.Y.S. Thruway Authority*, *supra*, this Court noted that what the New York Court of Appeals had decided was that the New York Court of Claims had jurisdiction to set aside an agreement settling a condemnation claim as incidental to determination of a claim for damages for condemnation. Applying the holdings in the *Guaranty Trust* case, the *Travelers Indemnity* case and the *Benz* case, it should follow that had claimant filed a claim for refund of motion picture license fees, the Court of Claims should have reviewed the validity of the motion picture statute as an element of that claim. To hold otherwise is to say that a claimant may elect to pursue his remedy in the Court of Claims when it supports claimant's position, but that the State may not assert as a defense that the Court of Claims could have determined all of the present petitioner's contentions in one action as the New York Court of Appeals held in *Guaranty*. Such a dual standard is untenable.

We note further that although claimant's petition sets forth its contentions with respect to the merits, it has made no argument with respect to the Federal question set forth in the amendment to the remittitur, namely, whether claimant's alleged need to bring two proceedings instead of one is a denial of due process.

In *Yakus* v. *United States*, 321 U.S. 414 (1944), this Court held that splitting the trial for violation of an administrative regulation by committing the issue of validity to an administrative agency and the issue of violation to a court did not violate the demands of due process. This Court wrote (p. 444):

> "And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue."

If determination of issues in a criminal matter may be split between tribunals without denial of due process, petitioner's thesis that it needed two tribunals in a civil matter presents no due process question.

Respondent submits, therefore, that case law supports its position that petitioner could have submitted all its issues in one claim in the Court of Claims in accordance with the cases cited above and furthermore, that even if two proceedings were necessary for a complete remedy, that does not present a constitutional issue.

**B. Petitioner presented no substantial Federal question in the New York Court of Appeals.**

As shown in subdivision A of this point, *supra*, the remittitur of the state court of last resort is not controlling as to whether or not a Federal question is presented.

Petitioner's point headings in its brief in the New York Court of Appeals demonstrate the absence of argument of a Federal question in that Court. Those headings were:

Point I — The movie licensing law was authoritatively declared unconstitutional on June 10, 1965 — not on March 15, 1965.

Point II — Payments of fees for pre-censorship of films exacted under penalty of criminal prosecution were not "voluntary" as a matter of law.

Point III — Claimant was aggrieved by the imposition of fees to finance an unconstitutional program of pre-censorship of films and considerations of retroactivity have no bearing in an action for refund.

Point IV — Every fee as to which refund has been directed was actually paid by claimant pursuant to its obligation to pay all license fees out of its own funds under the contract giving claimant the exclusive right to distribute every single Paramount picture in New York State.

Point V — The subpoena duces tecum was properly vacated.

These headings reveal the absence of Federal issues in this lawsuit.

The issue petitioner does argue in the instant petition, namely, its right to recover motion picture license fees paid without protest and without commencing proceedings to challenge the motion picture statute does not present a basis for certiorari. In *Universal Film Exchange* v. *Board of Finance and Revenue*, 409 Pa. 180 (Sup. Ct. of Pa., 1962), cert. den. 372 U.S. 958,* in which petitioner herein was one of eight petitioners, this Court rejected similar arguments.

Respondent submits, therefore, that certiorari should be denied.

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* October Term, 1962, Case No. 818.

## CONCLUSION

## CERTIORARI SHOULD BE DENIED.

Dated: June 29, 1973

Respectfully submitted,

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